UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC

AIM AEROSPACE SUMNER, INC., Respondent	)	
And	)	Case Nos. 19-CA-203455 19-CA-203586
INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 751, Charging Party	)	

RESPONDENT'S ANSWERING BRIEF TO CHARGING PARTY'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

NOW COMES AIM Aerospace Sumner, Inc., Respondent or AIM herein, and files its answering brief to the exceptions filed by Charging Party, as follows.

STATEMENT OF CASE

This case arises out of an effort by employees employed at Respondent's Sumner, Washington facility to oust the International Association of Machinists, District 751, (Union) as their exclusive bargaining representative. The effort culminated in a majority of unit employees signing a petition declaring that they no longer wished to be represented by the Union. The petition was presented to Respondent, and after reviewing and validating the petition, Respondent announced on July 24, 2017,[1] that it was withdrawing recognition from the Union. The Union filed an initial unfair labor practice charge on July 27, and a second charge on July 31. (GC Exhs. 1(a), 1(c)). On October 27, the Regional Director for Region 19 issued a consolidated complaint alleging that Respondent had committed certain unfair labor practices,

[1] All dates are 2017 unless otherwise indicated.

including unlawfully withdrawing recognition from the Union. (GC Exh. 1(g)). On November 9, Respondent filed a timely answer denying the material allegations of the consolidated complaint. The matter was heard before Administrative Law Judge Eleanor Laws on February 13, 14, and 15, 2018, in Seattle, Washington.

Although not directly relevant to this administrative proceeding, the Director instituted a parallel proceeding in the United States District Court for the Western District of Washington, seeking interim injunctive relief under § 10(j) of the National Labor Relations Act, as amended. In support of this petition, the Director presented affidavits from most of the witnesses who would eventually testify in the administrative hearing. On February 13, 2018, following an in-court hearing on February 7, 2018, the court denied the Director's petition for injunctive relief.

On May 16, 2018, the Administrative Law Judge issued her decision, in which she dismissed all of the allegations of the consolidated complaint, save one. Specifically, the Judge found merit to the allegation that Respondent violated §§ 8(a)(1) and (3) of the Act by promoting Lori-Ann Downs-Haynes to a receiving clerk position. The Charging Party subsequently filed timely exceptions, which contained a supporting brief.[2] Neither the General Counsel nor Respondent filed exceptions. Respondent now files its Answering Brief. Respondent is also filing cross-exceptions and a supporting brief.

[2] No exceptions were filed to the Judge's dismissal of the allegation (paragraph 6) that Respondent provided greater access to the employees leading the decertification drive, (JD 14-15); the allegation that comments and gestures made by Respondent on July 25 (paragraphs 7(a), 8, 9) violated the Act (JD 15-16), the allegation that Debbie Ruffcorn made comments on July 25 that violated the Act (paragraph 7(b)), (JD 16); and that on or about July 22, Ruffcorn made remarks regarding wage increases that violated the Act, (JD 18: 1-10). Accordingly, Respondent does not address these allegations.

STATEMENT OF FACTS

A. Background

Respondent operates three facilities in the general Seattle, Washington area, where it manufactures composites and ducting for the aerospace industry. These facilities are located in Auburn, Renton, and Sumner, Washington. (Tr. 25-26). Only the Sumner facility is directly involved in this proceeding. Prior to 2013, all three facilities operated on a nonunion basis. However, in 2013, following an election, the Union was certified as the exclusive representative of the Sumner employees. Negotiations between AIM and the Union ultimately succeeded, and the parties agreed to a four-year collective bargaining agreement (CBA), effective from April 25, 2014 through May 1, 2018. (Jt. Exh. 2).

In January 2017, new legislation in Washington State went into effect, raising the minimum wage. This required certain wage adjustments at all three facilities in order to come into compliance with state law. At Renton and Auburn, where the employees were unrepresented, Respondent used the change in minimum wage as an opportunity to reevaluate the wage scale and to make adjustments above and beyond those required by the new minimum wage law. These adjustments occurred in February. (Tr. 369). In May, the Sumner employees received the scheduled annual contractual increase. For employees who were at the top of their scale, this increase amounted to $0.10. (Tr. 384, 400).

B. Alleged Blaming of Union For Lack of Wage Increases

Union steward Guisseppe Mercado testified that in March he had a conversation with supervisor Rob Anderson regarding pay increases. At the time, Mercado had grown a beard for the purpose of avoiding being asked to paint. The beard prevented use of a respirator, which precluded Mercado from painting. On this occasion, Anderson approached Mercado and

questioned him as to why he no longer wanted to paint. Mercado responded that he did extra work but got the same raises as all other employees, even the lazy ones. Anderson responded that "because you're in a union and we have a contract, we can't pay you more." Mercado stated that that was "a lie" and that the contract gave the Company the discretion to pay more if it so desired. Mercado offered to show Anderson the contract language, but Anderson declined, and the conversation turned to other matters. (Tr. 141-142).

On a date Mercado could not specify, he had a similar conversation with manager Bill Keilman. On this occasion, Mercado was clean shaven, and Keilman asked why he was not painting. Mercado responded as he had with Anderson, and Keilman replied that "because you've got a union contract, we can't pay you more." Mercado again referenced the provision in the contract giving the Company discretion to pay employees above scale for legitimate business reasons. Keilman responded that the Company had a new vice president and Mercado should be patient. (Tr. 145-146).

C. Employees Cole and Downs-Haynes Start Employee Petition

In mid-June, several employees decided to initiate an effort to remove the Union as the employees' bargaining representative. The two primary leaders were Becky Cole and Lori-Ann Downs-Haynes. Cole testified that she had never supported the Union and had been waiting for the opportunity to oust the Union for a few years. According to Cole, employees were expressing dissatisfaction with the Union and what employees were receiving for their monthly dues. Cole had hoped that other employees would take the lead, but when they didn't, she and Downs-Haynes began discussing doing it themselves. Cole previously had worked at an employer where the union had been decertified and she was somewhat familiar with the process. Cole also did some research on the internet and was able to locate a sample decertification petition, which she

printed off her computer. During her discussions with Downs-Haynes, Cole made it clear that she did not want to be out front in soliciting signatures on the petition. Cole characterized herself as not being very social and her demeanor was clearly that of a person who held strong opinions and was not afraid to voice them. Further, Cole was older than Downs-Haynes, and her leg had been bothering her. Downs-Haynes, on the other hand, was more social and had no reservations about soliciting employees to sign the petition. Thus, it was agreed that Cole would assist in the background, but that Downs-Haynes would take the lead in getting the petition signed. (Tr. 258-263, Resp. Exhs. 3, 4).

Downs-Haynes testified that she joined the Union after it was voted in because she had been told that she needed to join in order to maintain her job. At some later point in time, she learned that this was not true. [3] When she questioned Union steward James Herness about this matter, he indicated that she would have to wait to get out of the Union, but she would still have to pay dues. Downs-Haynes then asked if there was another way, to which Herness responded that she could get a petition signed. Downs-Haynes asked how many signatures she needed, and Herness responded that she needed 60%. Downs-Haynes testified that she was displeased with the Union and the fact that the dues kept going up, which caused a hardship for her as she was a single mother with two children. [4] In talking with other employees, Downs-Haynes learned that there were others who felt as she did, and in June and July, she and Cole discussed starting a

[3] The CBA contains a maintenance of membership clause. Employees are not required to join the Union, but if they do, they must maintain that membership for the life of the contract. (Jt. Exh. 2).

[4] The record reflects that the Union's monthly dues increased to $49.95 in 2016 and to $50.60 in 2017. (Resp. Exh. 10).

petition. Cole handled the paperwork, and Downs-Haynes began getting signatures on the petition. (Tr. 276-283).

There is no allegation or evidence that any supervisor or manager distributed the petition, solicited any signature, encouraged any employee to sign the petition, or provided any active assistance to the employees leading the decertification effort. Director of Human Resources Debbie Ruffcorn testified that in mid-June, Downs-Haynes came to her office, upset at the $0.10 raise she received in May. Downs-Haynes stated that she felt like she was paying union dues for nothing and that she was going to try to get the Union out. She asked Ruffcorn how she should go about doing so. Ruffcorn replied that she did not know and could not answer that question. (Tr. 400-401).

The first signatures on the petition were collected on June 28. On June 30, Downs-Haynes scheduled a meeting with Ruffcorn for 7:00 a.m. [5] General Manager Mike Pratt was in Ruffcorn's office and remained for the meeting. Ruffcorn prepared detailed minutes of the meeting. (Resp. Exh. 11). During this meeting, Downs-Haynes asked a number of questions about how Sumner would be treated if the Union was decertified. Ruffcorn and Pratt consistently responded that they were neutral and could not answer these questions. Pratt specifically stated that there were no promises or guarantees. (Tr. 406-407). Later that day, Downs-Haynes requested a second meeting with Ruffcorn, this time because of a heated conversation that had occurred in the break room with Herness and Corrine Peterson. Leigh Booth was present for this meeting, and Ruffcorn again took minutes. Downs-Haynes expressed concern with Herness intervening in her conversation. Booth replied that the break rooms were open to all employees,

[5] It is undisputed that employees are permitted to, and frequently, do schedule meetings with Human Resources to discuss various issues. (Tr. 38, 67-68).

but that she could ask not to be interrupted. Booth and Ruffcorn further advised Downs-Haynes that she could not bother 2nd and 3rd shift employees during their work shifts. At the conclusion of the meeting, Booth and Ruffcorn stated that Downs-Haynes could not continue to schedule work time for meetings with Human Resources unless work related. (Tr. 408-409; Resp. Exh. 11). At some point in early July, Downs-Haynes asked Ruffcorn if she could have the total number of unit employees. After checking with others, Ruffcorn provided this information. (Tr. 461-462).

On July 5, Downs-Haynes scheduled a meeting with Ruffcorn for 3:10 p.m., after her shift ended. Mike Pratt was present, and Ruffcorn took minutes. (Resp. Exh. 11). Prior to the meeting, Ruffcorn again advised Downs-Haynes that she could not provide her with any guidance. During the meeting Downs-Haynes complained about Herness allegedly threatening employees that if they signed the petition, they would be fired. Ruffcorn replied that this was untrue, but if an employee felt threatened, he/she could come to Human Resources. At some point either during or right after the meeting, Downs-Haynes requested a list of dues paying employees. Ruffcorn replied that she could not provide this information. (Tr. 410-411).

D. AIM Is Presented With Petition And Withdraws Recognition

The last two signatures on the petition were collected on July 20. Cole testified that she attempted on three occasions to discuss the petition with the Board's regional office. On the first occasion, she was seeking general information regarding decertification and was referred to the Board's website. On the second occasion, she questioned the information officer about what to do with the petition after she obtained signatures. Cole explained that the contract was a four-year agreement and that as three years had expired, the petition would be timely. However, she was advised that she would have to wait for the 30-day window period. Believing that this

information was incorrect, but unable to find where she had read otherwise, Cole terminated the call. On the third occasion, Cole indicated that she had more than 50% signed up, and the Board agent gave her step-by-step instructions for filing the petition. The agent also advised that sometimes the Company would accept the petition. Cole then contacted Booth to see if Respondent would accept the petition. Booth confirmed that AIM would accept the petition, and on July 21, 2017, Cole presented the petition to Ruffcorn. (Tr. 263-266, 415-416). The petition stated that the "undersigned employees . . . do not want to be represented by IAM Local 751." The petition further requested that AIM withdraw recognition from the Union if it determined that the petition was signed by a majority of unit employees. (Jt. Exh. 1).

That same day, Ruffcorn undertook to analyze the petition. Specifically, Ruffcorn (1) compared each signature to an exemplar in AIM's files to verify authenticity, (2) eliminated duplicate signatures, (3) reviewed a list of current employees to determine whether the signers were still employed, and (4) counted the number of valid signatures to determine whether the petition was in fact signed by a majority of unit employees. Ruffcorn updated this analysis on Monday, July 24, 2017. She determined that as of that date, there were 142 valid signatures out of a total unit of 272 employees. (Tr. 416-423; Resp. Exhs. 13, 14). Based on its determination that the Union had lost majority support, AIM notified the Union on July 24, 2017, that it was withdrawing recognition effective immediately. (Resp. Exh. 15).

On July 25, Respondent met with employees and read a brief statement to employees:

> Recently, the Company was presented a petition signed by a majority of employees stating that they no longer wished for the IAM Union to continue to represent them. The Company validated the signatures and determined that they are genuine, and that the petition is in fact signed by a majority of unit employees. Under federal law, the Company cannot continue to recognize a union that it knows is not supported by a majority of employees. Accordingly, the Company notified the Union last night that it was withdrawing recognition from the Union and would

> not deal with the Union on an ongoing basis. This means that the collective bargaining agreement will cease to have any future effect. The Company is still evaluating its legal rights and will provide additional information soon. We are not able to provide additional information at this time. However, if you have individual questions that you feel cannot wait, please contact HR.

(Tr. 425, Resp. Exh. 16).

E. Downs-Haynes Seeks and Is Awarded Receiving Clerk Position

On or about May 21, Respondent posted a position opening for a receiving clerk. Consistent with prior practice, Respondent posted the position on a software program known as "Birddog HR." It then posted the position by the time clocks in the facility. On or about June 6, Respondent offered the job to Ervin Taylor, an external candidate. Taylor accepted the position and began work on June 12. After two weeks, however, Taylor stopped showing up, and the job was reposted on or about June 29. (Tr. 430-432, Resp. Exh. 19).

Following the initial posting, on or about June 4, Downs-Haynes had filed an on-line application seeking the receiving clerk position, and had completed a request for transfer on June 6. (Resp. Exh. 5). Ruffcorn testified that she did not become aware of Downs-Haynes' request until after Taylor had been offered the job. (Tr. 433). Accordingly, she had not been considered in the initial hiring process. However, when Taylor left, Respondent decided to look first at the internal candidates, of whom there were only two, Downs-Haynes and Laura Hobbick. Respondent had not initially interviewed Hobbick, as she had no shipping/receiving experience, but with the reposting of the position, Respondent interviewed both Hobbick and Downs-Haynes. Ruffcorn interviewed Hobbick on June 30. During this interview, Hobbick indicated that she was more interested in an engineering position. (Tr. 434-435, Resp. Exh. 20). Ruffcorn interviewed Downs-Haynes on July 6. Downs-Haynes was specifically interested in shipping/receiving, and she had prior experience. She also indicated that she had filled in at AIM

when shipping/receiving needed help. (Tr. 436-437; Resp. Exh. 21). Ruffcorn discussed the matter with the shipping/receiving supervisor, and he agreed that Downs-Haynes should be offered the position. (Tr. 438-440; Resp. Exh. 22). On July 11, Respondent offered the job to Downs-Haynes, retroactive to the beginning of the pay period (July 3). Her rate of pay was adjusted from the top manufacturing rate of $13.60 to the top support rate of $14, in light of her prior shipping/receiving experience. (Tr. 440-442).

ARGUMENT

A. AIM Did Not Unlawfully Blame Union for Lack of Wage Increases

Paragraph 10 of the consolidated complaint alleges that supervisors Keilman, Anderson, and Ruffcorn violated § 8(a)(1) of the Act by telling employees "that the Union was to blame for employees not receiving raises." These allegations arise out of Keilman's conversation with Mercado, Anderson's conversation with Mercado, and Ruffcorn's conversation with Herness. The Union challenges only the ALJ's dismissal of the allegations pertaining to Mercado and Herness. [Exceptions 1, 2]. This challenge is without merit. [6]

Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 7, 29 U.S.C. § 157, in turn, provides that employees "shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing . . . and shall also have the right to refrain from any or all

[6] Union exception 3 contends that the ALJ erred by disregarding a statement made by manager Pratt *after* Respondent withdrew recognition from the Union in response to an employee question regarding why Respondent waited to grant wage increases. In response, Pratt stated that Respondent was locked into the Union contract. [Exceptions at 9, 10]. The consolidated complaint, however, makes no allegation regarding Pratt's post-withdrawal statement, and in any event, it is a legal, and arguably the only logical, response to the question.

of such activities. . . .” Employers, however, are not without their own rights, including free speech rights as set forth in section 8(c) of the Act, 29 U.S.C. § 158(c): “The expressing of any views, argument, or opinion, . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.”

The statements attributed to the managers do not even arguably rise to the level of coercive conduct that would violate § 8(a)(1). Mercado and Herness both acknowledged that their conversations with the different managers arose in the context of each employee complaining that he should receive an above-scale raise because he was a hard and industrious worker in comparison to other employees. On each occasion, the manager referenced the CBA wage scale as being binding, and on each occasion, the steward responded that the contract gave management discretion to grant above-scale increases to individual employees for legitimate business reasons. What is absent, however, is any testimony that would support a finding that the managers threatened to withhold an increase to which employees were entitled or promised an increase if the Union were no longer present. The two stewards acknowledged that the contractual language upon which they relied was purely discretionary. Section 7.05 of the CBA merely permits AIM to address individual situations where there are unique circumstances. This discretion included the discretion not to grant individual increases. Notably, the Union never filed any grievance or charge over the failure to grant an increase, and as far as the record indicates, never requested to bargain over an additional wage increase. (Tr. 61).

The Union first argues that Keilman’s statement that he could not pay employees more because of the CBA “is coercive because it communicates to employees that the Union contract—and therefore the Union—is standing in the way of them receiving general wage

increases, with the obvious implication being that if the Union contract were not a barrier because the Union no longer represented the employees, the Employer would be free to grant wage increases, and would grant such increases." (Exceptions at 3-4, 8-9). This is utter nonsense. The CBA is a bilateral contract between Respondent and the Union. It is not the Union itself. Nor is there any implication of any kind. Further, Keilman's (as well as Anderson's) statements were made in response to questions from the two Union stewards, who were seeking to be paid above the contract scale. His reference to the CBA wage scale being controlling was nothing more than a statement of fact.

The evidence is best understood as reflecting a discussion between two knowledgeable Union stewards and various managers over the significance of certain contractual language and why neither steward had received an above-scale increase. The managers argued that the contractual wage scale (Appendix B) controlled, while the stewards argued that they could and should receive individual increases pursuant to Article 7.05. Section 8(c) of the Act clearly protects these type conversations between managers and employees, and whose argument regarding the merits of the disagreement might be said to be more persuasive or accurate is wholly irrelevant. Even assuming, *arguendo,* that the managers misunderstood or misrepresented the terms of the CBA, no violation of the Act can be found. Neither steward was remotely coerced, and the Board has held that it will not overturn an election or find an unfair labor practice based on a simple misrepresentation. *Midland National Life Ins. Co.*, 263 NLRB 127, 133 (1982); *accord, Great Dane Trailers Indiana, Inc.*, 293 NLRB 384, 401 (1989) ("Although Respondent misrepresented to its employees that they could be fined by the Union for attempting to decertify it, these misrepresentations are not objectionable conduct under [*Midland National*]").

The Union's cites no evidentiary support for its contention that the statements by Keilman and Anderson were "designed to (and did) cause disaffection with the Union." [Union Exceptions at 4]. This is not surprising given that the statements were only made to the two Union stewards, neither of whom had any disaffection with the Union and neither of whom signed the decertification petition.

The Union's criticism of the Judge's legal analysis is equally unpersuasive. [Union Exceptions at 5-6]. As the Judge found, the cases cited by the General Counsel and the Union all involve entirely different conduct. In *First Student, Inc.*, 359 NLRB 208, 222 (2012), the Board found that the employer violated § 8(a)(1) by telling employees during negotiations for a first contract that "there would be no raises while bargaining was ongoing." When a union is first certified, the employer must continue the existing "status quo" until the parties reach either a good-faith impasse or an agreement. The "status quo" includes any existing established practices of granting periodic wage increases. In *First Student*, the employer discontinued established step increases while bargaining was ongoing. Because these increases were part of the dynamic status quo, the employer violated the Act both by failing to continue the step increases and threatening employees that the employer would not give them. *First Student* is of no relevance here. AIM and the Union were not engaged in negotiations for a first-time contract. Indeed, there were no ongoing negotiations at all because a collective bargaining agreement was in place. This CBA established specific wage rates for each year of the agreement. Thus, the status quo was the CBA. There is no contention (or record evidence) that AIM told employees they would not receive contractually established raises.

In *Parkview Furniture Mfg. Co.*, 284 NLRB 947 (1987), the employer violated § 8(d) of the Act by unlawfully refusing to sign an agreement that had been reached. Thereafter, it

withdrew recognition from the union without any evidence that the union had lost majority support. The "blame" issue arose as a result of a strike assessment that the Union imposed on employees. Instead of making weekly deductions as requested by the union, the employer made the deductions in a single lump sum. When employees expressed anger at the large deduction, the employer stated that it merely did what the union had directed it to do, that its hands "were tied," and that if the employees no longer wanted the union, the employer could do something about it. *Id.* at 959-960. In this context, the Board found that the employer "created animosity through its lump sum deduction of the Union's strike assessment." *Id.* at 971. The employer did not merely point out that the union had voted for the strike assessment. Instead, it blamed the union for the employer's own unilateral act. Here, AIM took no unilateral action at all. It neither added nor deducted anything from employee paychecks. It neither granted employees anything they were not entitled to receive nor withheld anything they were entitled to receive. Finally, it made no suggestion that employees should get rid of the Union, nor did it state that doing so would result in any benefit to employees. *Parkview* is of no relevance here.

In *Equipment Trucking Co.*, 336 NLRB 277 (2001), *the complaint specifically alleged, and the Board found, that two employees acted as agents of the employer in attempting to decertify the union.* The employer authorized the employee agents to circulate a decertification petition with promises of a specific wage increase and additional benefits if they ousted the union. Upon receipt of the petition, the employer immediately withdrew recognition and granted the promised increases. *Id.* at 285-286. Unlike *Equipment Trucking,* there are no allegations that AIM representatives actually circulated the petition or made any promises regarding what would occur if the employees decertified the Union. *The complaint does not allege that Downs-Haynes was acting as an agent of AIM.* Whatever promises she may or may not have made were entirely

of her own doing and there is no legal basis for attributing them to AIM.

Finally, although not addressed by the Judge, Section 7.05 of the CBA is a "permissive" subject of bargaining because it authorizes AIM to bypass the Union and deal directly with employees on wages. Under well-established precedent, any party to a contract may, at any time, unilaterally rescind any permissive term of the contract without violating § 8(a)(5). *Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 183-186 (1971). In *KFMB Stations*, 349 NLRB 373 (2007), the Board held that an employer who had paid an employee above scale pursuant to a contractual provision permitting the employer to deal directly with employees lawfully reduced the employee's wages down to scale. Further, *the employer did not violate the Act or taint a decertification petition by specifically casting blame on the union for the reduction. KFMB* is dispositive.

Respondent requests that the ALJ's dismissal of these allegations be adopted by the Board.

B. Respondent Did Not Provide More Than Ministerial Aid.

In Exception 4, the Union asserts that Respondent provided more than ministerial aid to Downs-Haynes and Cole by (1) providing the number of employees in the unit and (2) explaining the timing of the contract bar rule when the contract is for longer than three years. [Exceptions at 10-13]. This exception in without any legal support.

An employer lawfully may provide "ministerial aid," so long as "the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned." *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985) (quoting *KONO-TV-Mission Telecasting*, 163 NLRB 1005, 1006 (1967)). "It is permissible for an employer to respond to questions by employees about decertifying a union, supply lists of employee names to a

decertification committee, allow a decertification petition to circulate during work hours and even provide language for the petition." *Glasser v. Heartland—University of Livonia, MI, LLC,* 632 F. Supp. 2d 659, 669 (E.D. Mich. 2009). The Board has held that "the essential inquiry is whether 'the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned.'" *Eastern Optical*, 275 NLRB at 372. Mere "ministerial" aid does not violate the Act as long as the employees are acting out of their own free will. *Bridgestone/Firestone, Inc.*, 335 NLRB 941 (2001); *Ernst Home Centers, Inc.*, 308 NLRB 848 (1992). "The Board has held that an employer is permitted to provide ministerial aid to an employee who has decided of his or her own volition to file a decertification petition, but violates the Act by actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing or filing of such a petition." *Bridgestone/Firestone, Inc.,* 335 NLRB 941, 948 (2001). "There is no bright line test with which to distinguish unlawful assistance from mere ministerial aid." *The Fresno Bee,* 337 NLRB 1161, 1178 (2002). "However, the Board appears to focus its assistance vs. ministerial aid inquiry on whether the inception, preparation, and processing of any decertification petition are the free and uncoerced acts of employees." *Id.* Generally, minimal assistance is not unlawful when it is "limited to aiding employees in the expression of their predetermined objectives." *Poly Ultra Plastics, Inc.*, 231 NLRB 787, 790 (1977). On the other hand, when the idea is initiated, or substantially propelled, by management, even minimal assistance may render the petition invalid. *See Twin City Concrete, Inc.*, 317 NLRB 1313, 1320-1321 (1995).

When it is clear that the petition is the uncoerced act of dissident employees, the Board has given such petition effect even when the employer provided assistance that might be deemed unwise. In *The Fresno Bee, supra,* the Board found no unlawful assistance even though (1) the

initiating employee sought and received approval from management prior to soliciting signatures; (2) management permitted the employee to use an additional locker to store the names; (3) the soliciting employee regularly reported to management the names collected; (4) management told the soliciting employee "to keep up the good work;" (5) on more than one occasion, a manager vacated his office to permit the soliciting employee to use his telephone in connection with the decertification effort; and (6) the soliciting employee collected names during working hours (although it was not clear whether he did so during actual working time). 337 NLRB at 1164. In finding no violation, the ALJ, with Board approval, emphasized that "Respondent's tacit approval of the decertification effort, however, does not equate to assistance" and that while the privileges granted "demonstrates a passive sort of assistance, I cannot find Respondent's actions to constitute unlawful endorsement or encouragement of the decertification activity." 337 NLRB at 1178-1179.

Similarly, in *Slapco, Inc., d/b/a St. Louis Auto Parts, Co.,* 315 NLRB 717, 720-721 (1994), the Board found that an employer lawfully withdrew recognition even though the soliciting employees used an office to type up the petition and used employer records to obtain employee names, albeit apparently without knowledge of the employer, as it was clear that the idea and momentum for the petition came from the two dissident employees.

In *Eastern States Optical Co.,* 275 NLRB 371, 371 (1985), the Board found no violation even though the soliciting employee called the employer's attorney and obtained language for the petition; the employer's attorney gave the employee the unit description to insert in the NLRB form; and the employer's attorney confirmed the number of signatures needed. In *Bridgestone/Firestone, supra,* the Board found a petition untainted even though the employer provided the soliciting employee with a sample petition to use in drafting his petition and

allowed him to post the petition on a bulletin board. 335 NLRB at 946. In *Consolidated Rebuilders, Inc.,* 171 NLRB 1415, 1417 (1968), the Board found no unlawful assistance when the employer sent the employees' attorney a list of the names and addresses of unit employees.

Against this legal background, the Union's contentions fall apart. The Union quibbles that in *Eastern Optical,* the unit was much smaller and the employer merely confirmed that the number of signatures already collected represented a majority of the unit. (Exceptions at 12-13). These distinctions are legally immaterial. The inquiry is "whether the inception, preparation, and processing of any decertification petition are the free and uncoerced acts of employees." *Fresno Bee,* 337 NLRB at 1178. Here, the idea for the petition originated with the employees, was propelled by their own research, and was carried out with no assistance from Respondent. That Respondent eventually provided the number of employees in the unit is inconsequential. *Consolidated Rebuilders, Inc.,* 171 NLRB 1415, 1417 (1968) (no unlawful assistance when the employer provided an actual list of the names and addresses of unit employees). Finally, the Union's suggestion that management explained the timing rules of the petition and that this aided the petition ignores the fact that Cole testified that she already knew that after three years, the Union could be decertified. (Tr. 267-268). Indeed, the explanation from management came *after* the petition began being circulated. (Tr. 464-465).

C. Respondent's Alleged Unfair Labor Practices Did Not Taint The Petition.

Union exception 5 challenges the ALJ's finding that the petition was not tainted by any unfair labor practices. Even if the Board were to agree that the statements made by Keilman and Anderson regarding the CBA and wage increases were violations of § 8(a)(1), which they clearly were not, the statements were not made to any employee who actually signed the decertification petition. This defect is fatal to the Union's contention. *Raley's,* 357 NLRB 880, 884 (2011) (no

evidence "to reasonably conclude that a determinative number of employees had been coerced into signing the UWRU's authorization petition"); *Quazite Corp.,* 323 NLRB 511, 512 (1997) (threatened employees did not sign petition).

The Union also argues that the Judge erred by finding that the unlawful promotion of Downs-Haynes did not taint the petition. [Exceptions at 14-16.] Again, the Union's contentions fail.[7] Except where the unfair labor practice involves a general refusal to recognize and bargain, "there must be *specific proof of a causal relationship* between the unfair labor practice and the ensuing events indicating a loss of support." *Id.* The criteria include: "(1) the length of time between the unfair labor practice and the withdrawal of recognition; (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; (3) the tendency to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union." *Id.* (quoting *Master Slack Corp.*, 271 NLRB 78, 84 (1984)).

Here, Downs-Haynes was not notified that she was awarded the position until July 11, some thirteen days after she began circulating the petition and after she herself signed the petition. Thus, receiving this position clearly did not cause her to undertake her decertification efforts. Further, the only other employee who was impacted either positively or negatively by the decision was Hobbick, and she signed the petition on July 7, some four days before the job was awarded to Downs-Haynes. Thus, she clearly was not influenced one way or the other by the award of this position to Downs-Haynes. No other employees were impacted in any fashion, and

[7] Respondent is filing cross exceptions to the Judge's finding that the promotion of Downs-Haynes violated the Act. The merits of that finding are being addressed in the supporting brief to these cross-exceptions. Thus, for purposes of this discussion, Respondent assumes, *arguendo*, that the promotion violated the Act.

there is no evidence that anyone knew what rate of pay Downs-Haynes was receiving. In these circumstances, there is nothing in the record that would support a finding of taint. As the ALJ observed, "it is difficult to see how this one personnel action would cause employees disaffection from the Union, particularly considering only two internal candidates applied for the position. The other employees were not privy to the quality or quantity of the other applicants, so they would have no basis for assessing whether or not Downs-Haynes was legitimately selected." (JD 21: 19-22). The Union cites no evidence that would contradict this finding. In essence, its argument boils down to the proposition that any unfair labor practice committed while a decertification petition is circulating "per se" taints the petition. The Board has rejected this theory, and the Judge's finding that the petition was not tainted should be adopted by the Board.

CONCLUSION

Respondent requests that the Union' exceptions be rejected.

Respectfully submitted this 27th day of June 2018.

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CERTIFICATE OF SERVICE

I certify that this day, I served the foregoing BRIEF on the following parties of record by electronic mail:

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